As summarized in the *PCS/Spectrum Cap NPRM*, the Sixth Circuit found the 20 percent cellular attribution standard to be arbitrary on the ground that it does not bear a reasonable relationship to the ability of an entity with a minority interest in a cellular licensee to obtain a PCS license and then engage in anti-competitive behavior. *Cincinnati Bell*, 69 F.3d at 759. The Court reasoned that the Commission had not justified its predictive conclusions as to the possible future behavior of future marketplace entrants through the use of expert economic data or by analogizing to related industries in which the claimed anticompetitive behavior has taken place. *Id.* at 760. Finally, the Court rejected the Commission's reliance on the need for an easily administrable, bright-line rule, in view of the fact that the Commission has adopted less restrictive yet easily administered rules in other situations, *e.g.*, the Commission's attribution rule for determining when businesses owned by minorities or women (currently small businesses for block C) will be eligible to bid on spectrum in the C block auctions, as argued by Cincinnati Bell. *Id.*[22]

[22]The Commission stated that the Court in *Cincinnati Bell* did not find Section 24.204(d)(2)(i) of the Rules (which provides for a 5 percent attribution threshold for interests in PCS licensees or applicants for purposes of the 35 MHz cellular/PCS and 40 MHz PCS spectrum caps) to be arbitrary, and that it does not propose to modify this rule. *Bidding/Spectrum Cap NPRM* at 33 para. 74. Western maintains that each of the arguments advanced by the parties and the decision of the Sixth Circuit in *Cincinnati Bell* with respect to the 20 percent cellular attribution limit applies with equal force to the 5 percent PCS attribution limit–if a 20 percent cellular attribution standard will not withstand the scrutiny of a reviewing court as reasonably related to the Commission's goals of implementing the purposes of Section 309(j) of the Act, it is inconceivable that a 5 percent PCS attribution standard would be upheld. In reconsidering the spectrum cap rule, the Commission should implement any changes made to the cellular attribution standard also in the context of the PCS attribution standard.

Western maintains that adequate expert economic data or analogies to related industries do not currently exist in the record and cannot reasonably be expected to be found to support the 20 percent rule. Western advocates that the Commission revise its rules to substitute a test based on *de jure* and *de facto* control as the benchmark for ownership attribution. Western thus requests that the Commission substitute the use of a control test based on that set forth in Section 24.709(b)(6) of the Rules, 47 C.F.R. § 24.709(b)(6) (used to determine whether a C block bidding entity's control group possesses the requisite level of equity and *de facto* control over the applicant to permit the exclusion of assets and revenues of non-attributable investors in the applicant).[23] The Commission may want to modify this standard to provide that either 50 percent equity ownership or *de facto* control of a cellular or PCS licensee will suffice for ownership attribution for spectrum cap purposes, *i.e.*, both *de facto* and *de jure* control need not be established.

Clearly, the Commission's chief concern in fashioning the cellular eligibility restriction has been that parties having control or influence over a cellular entity might have reduced incentive as PCS licensees to compete vigorously against the cellular licensees in the same geographic market. In the context of modifying Section 24.204 of the Rules to

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[23]The flip side of 24.709(b)(6) is that a single outside investor with up to a 49.9 percent equity interest that is "passive" (*i.e.*, holding no more than 25 percent of the voting interests of the applicant) will not be deemed to have an attributable interest in the applicant for purposes of asset and revenue attribution, presumably on the assumption that the applicant will be controlled by the "control group," which must have a 50.1 percent equity and 50.1 percent voting interest. Thus, in the context of eligibility for the C Block auction, the Commission has assumed that an outside investor with up to a 49.9 percent equity interest does not measure for purposes of the eligibility of the enterprise. Furthermore, the Commission has in this context also established a rule that requires a case-by-case determination of "control" rather than relying on an easily applied, bright-line rule.

create additional opportunities for entities with non-controlling, attributable cellular interests to bid on in-market PCS licenses and subsequently to divest offending interests, the Commission stated: "We now conclude that entities holding controlling interests have greater incentives to act anticompetitively in the auction process than entities with non-controlling interests . . . ." *PCS Third M O & O*, 9 FCC Rcd. at 6914 para. 33. Similarly, in justifying its decision to raise the attribution threshold from 20 percent to 40 percent for designated entities, the Commission stated that "many designated entities are merely passive investors in cellular operators and, because of their size, are unlikely to influence pricing decisions." *PCS M O & O*, 9 FCC Rcd. at 5007 para. 125. Even when it adopted the 20 percent cellular attribution standard, the Commission nonetheless also recognized the paramount importance of controlling interests in providing that "controlling interests *per se* are attributable," citing existing case law for making control determinations where such issues arise (and thereby adding a layer of complexity to its easily-administered, bright line rule). *Id.* at 5005 para. 118. Because the Court exhorted the Commission to examine less restrictive alternatives to the bright line cellular attribution rule that is now before the Commission on remand, *Cincinnati Bell*, 69 F.3d at 761, the Commission should focus primarily on those ownership interests that it has recognized in the very context of its cellular/PCS ownership restrictions as having the most potential for anti-competitive effect, *i.e.*, controlling interests.

The excerpts from the orders cited above also undercut the Commission's argument that an easily applied, bright-line rule is needed to avoid unnecessary delays in determining PCS eligibility issues and speed the administrative process. *Id.* at 760. In the first place,

even under the current rule, an analysis must be made to determine if ownership levels of less than 20 percent nonetheless confer *de facto* control, which entails a case by case examination of the facts. Second, in determining eligibility for the C and F block auctions, the Commission has created a set of rules that requires an examination in each instance where a control group structure is used as to whether the qualifying members exercise *de facto* control over both the control group and the applicant. To Western's knowledge, there is no statistical data to show that the requirement for such an inquiry has in any way burdened or slowed the application process for the C block auction. Similarly, in determining the permissibility of the divestiture of attributable interests in PCS and cellular licensees where the geographic overlap exceeds 20 percent, an analysis of control concepts is required.[24] These instances all illustrate the fact that the Commission could readily base any restrictions on the ability of an investor in a cellular licensee to hold an in-market cellular license on an analysis of control without burdening the administrative process.

B. The Partitioning Rules Should Be Modified to Allow the Sale of a Portion of a PCS Market to Any Qualified Entity.

Closely interrelated with the ability of a cellular carrier to obtain PCS spectrum in excess of 10 MHz in the area of its cellular service is the carrier's ability to divest interests so as to come into compliance with spectrum aggregation limits. Part of the equation is the

[24]*See* Section 24.204(f)(1)(i)(C) of the Rules, 47 C.F.R. § 204.204(f)(1)(i)(C). In this context, the Commission has made an effort to streamline determinations of control by defining a "non-controlling attributable interest" as "one in which the holder has less than a fifty (50) percent voting interest and there is an unaffiliated single holder of a fifty (50) percent or greater voting interest." To the extent that such a standard will reduce the need for time-consuming factual inquiries relating to control, Western would be in favor of utilizing this or a similar control test in the context of the reconsidered cross-ownership restriction.

pool of buyers that are permitted under the Commission's rules for both the offending cellular and PCS interests. Current divestiture rules allow parties some additional flexibility to bid on PCS spectrum in a market where there is cellular overlap. For example, under current rules, a person with a non-controlling but attributable interest in a cellular license may bid on a PCS market regardless of the degree of population overlap, provided that (if successful at the PCS auction) it divests its interest in either the cellular and PCS market to come into compliance with the spectrum cap within the time periods provided in the rules. *See* Section 24.204(f) of the Rules, 47 C.F.R. § 24.204(f).[25] The ultimate effectiveness of the bid but divest procedures, of course, depends upon the ability of the license holder to find a buyer on fair market terms. For instance, the time limits imposed by the rules for effecting the divestiture could limit the ability to reach a large pool of potential buyers or to negotiate a fair price. It has been argued on multiple occasions that the 90 day divestiture requirement is unrealistic, given the need to locate buyers, negotiate the transaction, and obtain the Commission's approval. *See PCS Third M O & O*, 9 FCC Rcd. at 6911 para. 20. Western acknowledges that the divestiture rules have not been raised in the *Bidding/Spectrum Cap NPRM*; however, because of the interrelationship of the divestiture rules and the cross-ownership rules that are the subject of this proceeding,

[25]The divestiture procedures are not available in all instances. For example, under the current rules, a party with a controlling interest in a cellular license may have an attributable interest in a PCS applicant and subsequently divest if successful at the auction only if the CGSA of the cellular market covers 20 percent or less of the PCS service area population. Section 24.204(f)(1)(i). Should the overlap be greater, then the party cannot bid on the PCS license at all.

Western strongly suggests that the Commission expand the opportunities for divestiture of controlling interests and the time periods for divestiture in all cases.

A further limitation on the ability of a PCS license winner (or buyer in the secondary market) to locate a buyer of its offending spectrum is imposed by the current rules on geographic partitioning of a PCS market. Pursuant to Section 24.714(c) of the Rules, 47 C.F.R. § 24.714(c), only a rural telephone company is eligible for a broadband PCS license that is geographically partitioned from a separately licensed MTA or BTA, and then only if the partitioned area is "reasonably related to the rural telephone company's wireline service area." A reasonable relationship will be presumed if the partitioned service area contains no more than twice the population overlap between the rural telephone company's wireline service area and the partitioned area. The effect of these requirements is that there is a very small pool of potential buyers for a partitioned portion of an MTA or BTA (presumably, in many instances only one), none of which may be interested in purchasing the applicable portion of the PCS market. Even if one should, the rural telco's knowledge of its unique or almost unique status as a potential buyer could certainly be expected to erode any bargaining power that the PCS licensee might have to get a fair price for the partitioned portion of the market. A rural telco's purchase of a portion of a PCS market at a bargain price would not promote the Commission's stated objectives of putting the licenses in the hands of those that value them the most and thus promoting the most rapid, diverse and cost effective provision of PCS service to the public.

Western acknowledges that the subject of partitioning has been examined in a separate rulemaking.[26] However, Western maintains that the restrictions on partitioning cannot be overlooked in the context of any proceeding that addresses the restrictions on a cellular licensee's acquiring PCS licenses in the area of its cellular operations. The Commission should greatly expand the pool of potential buyers of partitioned PCS markets as part of this rulemaking or any other imminent rulemaking on the subject. Western urges the Commission to include as acceptable buyers all parties that are qualified to be a Commission licensee, with possible eligibility restrictions in the C and F blocks based on the restrictions facing a buyer of the entire market.[27]

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[26]*See Fifth Report and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding)*, PP Docket No. 93-253, 9 FCC Rcd. 5532 (1994).

[27]As referenced in the *PCS M O & O*, several parties have petitioned the Commission to permit applicants to subdivide PCS blocks and service areas. Cited benefits of partitioning include: (i) promoting efficient use of the spectrum and encouraging service in rural areas; (ii) offering flexibility to PCS providers; and (iii) expediting the introduction of new services, promoting participation in PCS and allowing PCS to serve niche markets. 9 FCC Rcd. at 4989 para. 81. Clearly, these goals are not promoted by limiting the pool of potential buyers of a geographically partitioned market to the one or, at most, handful of rural telcos eligible to hold the market. More recently, in the Commission's *En Banc* Hearing on Spectrum Policy held on March 5, 1996, Wayne Perry, Vice Chairman of AT&T Wireless Services, Inc. submitted the following statement:

> Another area in which we believe market forces should be given a freer rein is in connection with the rules governing the transfer of spectrum purchased at auction. We believe that if an entity has paid fair value for spectrum purchased at auction there should be few if any restrictions on its ability to sell or lease all or part of that spectrum. While rules against sales, disaggregation or partitioning of spectrum make sense when the owner has received some subsidy in the purchase of the spectrum, such rules only create inefficiencies in the roll-out of services for spectrum purchased at fair market value.

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C. Any Qualified F Block Bidder Should Be Eligible to Bid on F Block Licenses.

The Commission has sought comment on whether there is need to make adjustments to the financial eligibility threshold for the F block auction. *See Bidding/Spectrum Cap NPRM* at 17 para. 33; 23 para. 50. Western maintains that C block license holders should be able to exclude the value of their C block licenses from their total asset and gross revenue calculations so as to preserve their ability to bid on F block licenses. First, the Commission has recognized the benefits of the economies of scope and utilization of current experience and facilities from related services, such as cellular, in promoting the efficient and rapid introduction of PCS service. Clearly, existing PCS licensees would be in the best position to draw on their current resources to achieve this aim. Second, depending on the applicable years used by the Commission in determination of total assets and gross revenues, certain existing C block licensees may or may not be required to include the value of their licenses (depending on the time of the receipt of their license, which may depend on events beyond the control of the licensee, or the use of a calendar or fiscal accounting year by the licensee), and thus be eligible or ineligible to bid in the F block. Such result

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[27](...continued)

> . . . It is unlikely that an entity that has paid a substantial, market driven price for spectrum at auction would have any incentive to warehouse it rather than putting that resource to its highest and best use. Nonetheless, there may be market niches the original owner is unable to tap.

Statement at 3-4. *See also* the Remarks by Michele Farquhar, Acting Chief, Wireless Telecommunications Bureau, March 25, 1996 before the CTIA Wireless '96 Convention, "Getting into the Loop," Dallas, Texas, at 8, where Ms. Farquhar stated: "As we auction spectrum in defined blocks, we need to consider how we can enable spectrum partitioning and disaggregation and possibly other flexible assignment mechanisms."

should not depend on the vagaries of whether a C block license is included in a given case, but rather should be the result of a reasoned policy decision. Third, the Commission has recognized that 10 MHz of PCS spectrum may be inadequate to provide certain types of service and that aggregation of multiple blocks (subject to the spectrum aggregation limits) should be permitted and encouraged. Foreclosing a C Block license holder from the opportunity to acquire an additional 10 MHz of spectrum (whether within or outside its market), merely because of the increase in assets or revenues resulting from the acquisition of the license, could thwart these Commission objectives, and visit a particularly harsh result on small businesses and entrepreneurs by penalizing them for their prior successes in the auctions. Finally, in the context of sales of C or F block licenses by the auction winner, the Commission's rules permit a buyer who at the time the application for assignment or transfer of control is filed holds other entrepreneurs' block license(s) and thus at the time of receipt of such license(s) met the eligibility criteria set forth in Section 24.709. Section 24.839 (d)(2), 47 C.F.R. § 24.839(d)(2). The Commission emphasized that "we have a strong interest in seeing entrepreneurs grow and succeed in the PCS marketplace," and not "penalizing them for their success." *Fifth Memorandum Opinion and Order (Implementation of Section 309(j) of the Communications Act - Competitive Bidding)*, PP Docket No. 93-253, 10 FCC Rcd. 403, 420 para. 27; 468 para. 125 (1994). This logic applies with equal force to C block license holders bidding in the F block auction.

D. The Commission Should Retain the Most Favorable Installment Method and Maximum Bidding Credit for Small Businesses Acquiring F Block Licenses.

The Commission has sought comment on whether the most favorable installment payment terms and bidding credits are necessary for F block auction winners, in view of the

fact that the amounts bid for the 10 MHz licenses most likely will be lower than those bid for the 30 MHz licenses. *Bidding/Spectrum Cap NPRM* at 20-21 paras. 45-47. Western maintains that the Commission should leave in place the most favorable installment method and maximum bidding credits that the auction winners in the C block auction enjoy. Apart from the intuitive appeal of the consistency of treatment of C and F block auction winners, it can be expected that many smaller companies will bid for the smaller 10 MHz licenses, and hence will derive a proportionate benefit from the same installment plan and bidding credit as the larger companies bidding in the C block. In the case of the bidding credits, because it can be anticipated that the purchase prices will be lower, the dollar amount of a bidding credit computed on the basis of a constant formula will be proportionately lower.

E. Neither Installment Payment Plans Nor Bidding Credits Should Be Extended to the D and E Blocks.

The Commission has sought comment on whether it should extend installment payment plans to small businesses bidding on the D and E blocks. Western opposes such action. It is apparent from the course of the bidding in the C block auction that many of the "small businesses" that, in theory, needed federal benefits to allow them to compete with the larger companies, have bid through their bidding credits, and presumably have no more need for installment payment plans than many of the entities that do not qualify for small business status. The result is that some companies have received something more in the nature of a windfall than a means of promoting competition among a more diverse group of PCS entrants. For this reason alone, the Commission should hesitate to depart from

its original allocation of benefits limited to the C and F blocks and not extend installment payment options (or bidding credits) to the D and E blocks.

F. The Commission Should Implement Substantial Increases in the Amounts of Both the Upfront Payments and the Down Payments for the F Block in Order to Minimize Insincere or Frivolous Bidding.

The Commission has sought comment on whether it should increase the amount of the upfront payment for the F block auction from the current discounted figure of $0.015 to $0.020 per bidding unit or more, in order to minimize the possibility of insincere or frivolous bidding. *Bidding/Spectrum Cap NPRM* at 26 para. 57. Western strongly endorses an upfront payment that is increased substantially above even the undiscounted figure of $0.020 per bidding unit in order to eradicate the possibility of insincere bids, which some have alleged to be occurring in the context of the C block auction.[28] The upfront payment is the sole guaranteed source of funds from which to collect penalties in the event that a bidder submits a bid at the auction and does not follow through in making its downpayment. Because of the potential magnitude of the penalties—the difference between the amount bid and the winning bid and, if the default occurs after the auction, 3 percent of the winning bid, Section 1.2104(g), 47 C.F.R. § 1.2104(g)—the Commission may well be left in the position of imposing a penalty that it has no means to collect absent an upfront payment that is high enough to cover the penalty.[29] Unless those bidders considering

[28]See Public Notice (Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules), DA 96-481 (April 4, 1996), in which the Bureau responded to inquiries about bidders who do not make their required downpayments by confirming that its default rules would be enforced strictly.

[29]Western suggests that the amount of the upfront payment be increased from $0.015 (continued...)

insincere of frivolous bids know that the Commission will have a ready source of funds to pay all penalties, the Commission's default rules will lose much of their teeth, and the abuses that are rumored to be occurring at present will only be aggravated.

The Commission has also requested comment on whether it should increase the required down payment for the F block auction from the current discounted level of 10 percent to 20 percent of the winning bid in order to guard against the possibility of bidder default. Western advocates that the down payment be increased to a figure substantially above the 20 percent level. The damage resulting from a bidder default long after the close of the auction could be severe. Reauctioning of a single license will be a time-consuming and expensive process, and the public may well be harmed by a long delay in the provision of service on that spectrum. The best single way to insure that such harmful defaults do not occur is to increase the financial stake of the licensee. Requiring a mere 10 percent investment may allow speculators to hedge their bets and chose to walk away from the enterprise should it disappoint their investment objectives. A higher figure would only attract those bidders intent on viable and vigorous competition in their market.[30] The time

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[29](...continued)
per bidding unit to $0.20 per bidding unit. Even at this level the Commission may find itself pursuing defaulting bidders for the difference between the penalties imposed and the upfront monies applied to the penalties.

[30]Western suggests a downpayment figure of 50 percent. Although this represents a substantial increase over the current 10 percent level and even the 20 percent that applies in the non-entrepreneur blocks, it would be an effective means of preventing the abuses that some speculate are likely thus far. Besides, the 20 percent figure is largely meaningless–A, B, D, and E block bidders are required to pay the remaining 80 percent of their winning bids within 5 business days after the grant of their licenses. Should they default in this payment, then the Commission would be in a ready position to reauction the license
(continued...)

to deter the rumored abuses of insincere and frivolous bidding is now, and the single most effective means is to set the upfront payments and down payments at levels that insure the Commission will have the funds from which to pay all penalties and to cause the perpetrators to feel the financial effects of their failing to abide by the rules.

G. The Commission Should Amend Sections 24.813(a)(1) and (2) of the Rules to limit the Information Disclosure Requirement in Accordance with the Proposal Set Forth in the NPRM, Delete the Requirement that Partnership Agreements Be Filed, and Permit the Use of Unaudited Financial Information.

The Commission has proposed to limit the information disclosure requirement pursuant to Sections 24.813(a)(1) and (2) of the Rules, 47 C.F.R. §§ 24.813(a)(1) and (2), to require only the disclosure of attributable stockholders' direct, attributable ownership in other businesses holding or applying for Commercial Mobile Radio Service ("CMRS") or Private Mobile Radio Service ("PMRS") licenses. The Commission has also proposed to amend Section 24.813(a)(4) to delete the requirement that partnerships file a signed and dated copy of the partnership agreement with their short-form and long-form applications. *Bidding/Spectrum Cap NPRM* at 36 para. 81. Western supports both of these changes. Section 24.813(a)(1), in its current form, requires that each broadband PCS applicant disclose businesses of all kinds five percent or more of whose stock is owned by the applicant or an officer, director or attributable stockholder. The Commission has stated that the "multiplier" should be used in determining attributable interests, such that holders of attributable direct and indirect interests in the applicant must disclose their five percent

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without much delay, and perhaps could still sell it to the next highest bidder from the earlier auction. Because defaults in the F block auction may occur years after the auction, a strong argument can be made that the F block downpayment should be substantially higher.

outside interests. *Fourth Memorandum Opinion and Order*, PP Docket No. 93-253 (rel. October 19, 1994) at para. 58 n. 123. Bidders and license winners complying with these requirements in preparing their forms 175 and 600 will face an enormous reporting burden, and much of the information requested will in no way serve the stated purposes of the Commission's disclosure rules, namely to police the multiple and cross-ownership rules, alien ownership restrictions and anti-collusion requirements. *Order (Implementation of Section 309(j) of the Communications Act — Competitive Bidding)*, PP Docket No. 93-253 (rel October 25, 1994) at para. 4. In fact, the enormity of these disclosure requirements will discourage investment in PCS by many potential investors, thus restricting the access of smaller companies to the capital that they will need to compete in PCS. The paramount goal of promoting competition among a diverse group of PCS service providers will be thwarted. In view of these concerns, the Commission has in each instance (*i.e.*, at the time of the filing of the short and long form applications for the A and B block auction and the short form for the C block) waived the requirements of the rule, most recently to limit the disclosures to direct interests in CMRS and PMRS providers. *See Bidding/Spectrum Cap NPRM* at 35. para. 79. Accordingly, Western supports the Commission's proposal to make a permanent change to the rule in accordance with the recent waivers. Similarly, the Commission has also waived the requirement that applicants submit partnership agreements with their short and long form applications, on the ground of the possible detrimental effect of the disclosure of strategic business objectives and other proprietary information contained therein. Western also supports a permanent change in Section 24.813(a)(4) to delete this requirement.

Sections 24.720(f) and (g) of the Rules, 47 C.F.R. §§ 24.720(f) and (g), require that calculations of gross revenues and total assets (for purposes of eligibility and small business status for the C and F blocks) be determined based on audited financials. The Commission has proposed to allow each applicant that does not otherwise use audited financial statements to provide a certification from its chief financial officer that the gross revenue and total asset figures that it provides in its short-form and long-form applications are true, full, and accurate, and that the applicant does not have the audited financial statements that are otherwise required under the rules. Western supports this change, concurring with the Commission's reasoning that such a modification to the rules would be the most effective way to amend the rules so that small businesses are not overly burdened by auditing their finances when they would not otherwise do so. To the extent audited statements are readily available, however, they should be used. Western also feels that applicants that use a fiscal year in the regular course of their business should be allowed to rely on such data in computing their gross revenues, rather than being burdened with compiling new figures on a calendar year basis.

III. CONCLUSION

In the interest of allowing a wider range of entities to own PCS spectrum and enabling those companies with the existing experience and infrastructure to utilize those resources to promote the rapid and efficient development of PCS for the public benefit without in any way reducing competition in the marketplace, Western respectfully urges the Commission to modify the cellular/PCS cross-ownership rule to allow cellular carriers to hold a 30 MHz PCS license within areas served by their cellular systems. To the extent that the Commission finds a need to impose some restrictions on cellular eligibility for PCS,

Western suggests that the limit on PCS/cellular population overlap be set at a figure of 20 percent or higher, and that the attributable ownership level be based on considerations of *de jure* and *de facto* control. Western also urges the Commission to adopt the other rule changes described above.

Respectfully submitted,

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